

***NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 30-102-05
AUGUST 17, 1998***

***Administration and Operations
Regulatory Guidance***

***GUIDANCE ON DRAFT DECISION DOCUMENTS FOR REGULATORY ACTIONS;
ISSUES ADVISORIES***

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OPR: F/ (R. Schmitten)

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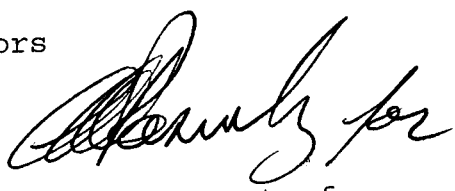
Signed _____
[Approving Authority name] Date
[Approving Authority title]



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1335 East-West Highway
Silver Spring, MD 20910
THE DIRECTOR

AUG 17 1998

MEMORANDUM FOR: Regional Administrators
Office Directors

FROM: Rolland A. Schmitten 

SUBJECT: Guidance on Draft Decision Documents for
Regulatory Actions; Issues Advisories

This is to advise you that, effective immediately, you should no longer submit to me draft decision memoranda for regulatory actions for which I am expected to make a decision. The Regulatory Effectiveness Board has identified several concerns associated with the draft memoranda and has recommended that, in order to resolve these concerns and still provide me with advance notice of upcoming actions, you submit to me a document entitled "Issues Advisory" prior to signing and sending the decision memorandum. I have accepted this recommendation.

The Issues Advisory you submit should be similar to a decision memorandum in that it identifies significant policy, legal, and science issues of the upcoming action. Unlike a decision memorandum, however, there should be no final recommendations or determinations of legal compliance. It should include a preferred alternative and may include other alternatives.

You must submit the Issue Advisory to me through normal review channels prior to your submission of the signed decision memorandum and any accompanying rulemaking package. The Issues Advisory should be sent to F/CU for routing to the appropriate Headquarters Office for review and comment. Further, you must submit the Issues Advisory early enough to provide time for me to discuss any outstanding issues with you prior to your submission of the signed decision memorandum.

Finally, there must be written acknowledgment of my having been informed of significant issues prior to your submission of the signed decision memorandum. That acknowledgment can be via an e-mail, initialed routing slip, or other means. Attached is a sample Issues Advisory.

I will endeavor to make sure that the review and acknowledgment process is completed in a timely manner, but doing so requires your submission of the Issues Advisory far enough in advance of your anticipated date for signing the decision memorandum to allow processing in Headquarters.

Attachment



Attachment.

Examples of Draft Decision Memorandum and Issues Advisory.

The following examples are intended to illustrate the relationship between a draft Decision Memorandum (which will no longer be required) and an Issues Advisory (which will substitute for the draft Decision Memorandum) for the same action. The example chosen was modified somewhat from the original.

Note that these examples are for a relatively complex and controversial action. Therefore, they contain additional explanation of issues as an attachment; this is not a requirement, but may be useful in certain cases. The most important difference between the two documents is that the Issues Advisory does not make recommendations or determinations. It is intended to serve as advance information regarding an upcoming action.

EXAMPLE--DRAFT DECISION MEMORANDUM

MEMORANDUM FOR: Rolland A. Schmitten
Assistant Administrator
for Fisheries

FROM: Steven Pennoyer
Administrator, Alaska Region

SUBJECT: Clearance of Proposed Rule to Implement
Amendment 49 to the Fishery Management Plan
for the Groundfish Fishery in the Bering Sea
and Aleutian Islands Area (FMP)--DECISION
MEMORANDUM

I request that you make determinations about the proposed rule and transmit it to the Department of Commerce for clearance to publish in the Federal Register.

BACKGROUND

This controversial rule would implement Amendment 49 to the FMP, which would require all vessels fishing for groundfish in the Bering Sea and Aleutian Islands Area (BSAI) to meet new standards for retention and utilization of pollock, Pacific cod, rock sole, and yellowfin sole.

In September 1996, the North Pacific Fishery Management Council (Council) approved unanimously an Improved Retention/Improved Utilization (IR/IU) program as Amendment 49 to the FMP. The expressed intent of the Council is to implement a program that "would provide an incentive for fishermen to avoid unwanted catch, increase utilization of fish that are taken, and thus reduce discards of whole fish."

Approximately 600 million pounds (273,000 metric tons) of groundfish were discarded annually in the groundfish fisheries of the BSAI in each of the last several years, which represents an unacceptably high level of discard and waste in the eyes of the Council, the fishing industry, and the American public. Furthermore, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) now provides a mandate for regulatory programs to improve retention and utilization in the groundfish fisheries off Alaska.

ELEMENTS OF THE PROPOSED IR/IU PROGRAM

Retention requirements. All operators of vessels participating in the groundfish fisheries of the BSAI would be required to retain all pollock and Pacific cod beginning January 1, 1998, and all rock sole and yellowfin sole beginning January 1, 2003,

regardless of gear type employed or target fishery. At-sea discarding of whole fish of these IR/IU regulated species would be prohibited either prior to, or subsequent to, that species being brought on board the vessel. When directed fishing for an IR/IU regulated species is prohibited, a vessel operator would be required to retain all catch of that species up to the maximum retainable bycatch amount in effect for that species, and discard any catch in excess of the maximum retainable bycatch amount.

Utilization requirements. All at-sea processors (catcher/processors and motherships) would be required to utilize each landed or delivered IR/IU regulated species in the production of a retained product. This requirement would begin January 1, 1998, for pollock and Pacific cod, and January 1, 2003, for rock sole and yellowfin sole. In addition, all at-sea processors would be required to maintain a 15-percent utilization rate for each IR/IU regulated species. In other words, at any time during a fishing trip, an at-sea processor must have produced sufficient products (or whole fish) of each IR/IU regulated species on board to equal 15 percent, by weight, of the round-weight catch of that IR/IU regulated species landed or delivered during that fishing trip.

ECONOMIC IMPACTS OF THE PROPOSED RULE

This proposed rule is controversial because it is expected to cause significant economic impacts to certain sectors of the fishing industry. The Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prepared for Amendment 49 examined the economic effects of this proposed rule by fishery and gear type. The analysis concluded that the economic effects on trawl vessels participating in the Pacific cod, rock sole, yellowfin sole, flathead sole and "other" flatfish fishery would be significant. Compliance with the proposed rule could impose significant operational costs on these fisheries, taken as a whole. Furthermore, for species for which markets are limited or undeveloped (e.g., small Pacific cod, male rock sole) 100-percent retention requirements would impose direct operational costs that probably cannot be offset (in whole or in part) by expected revenues generated by the sale of the additional catch. No quantitative estimate can be made of these costs at present.

In general, the impacts on any individual factory trawler operation would vary inversely with, for example, size and configuration of the vessel, hold capacity, processing capability, markets and market access, as well as the specific composition and share of the total catch of the four IR/IU regulated species. The burden will tend to fall most heavily upon the smallest, least diversified operations among the current fleet. In addition, the vessel moratorium and license limitation programs, as well as Coast Guard load-line requirements, place severe limits on reconstruction to increase vessel size and/or processing capacity, which will further limit the ability of

smaller catcher/processors to adapt to the proposed IR/IU program.

Catcher/processors participating in the Pacific cod fishery that are limited to Head and Gut (H&G) product will be significantly disadvantaged because viable markets for H&G pollock do not exist. In addition, the physical limitations of the current fleet of catcher/processors that operate in the rock sole, yellowfin sole, flathead sole, and "other" flatfish fisheries could make adaptation to, and compliance with, the proposed IR/IU program effectively impossible. The result may be that adoption of the proposed rule could create such an operational barrier that the rock sole fishery would be discontinued, or alternatively the small vessel fleet that currently comprises this fishing fleet might be displaced by larger and more operationally diversified fleets of vessels, e.g., larger catcher/processors and motherships.

RECOMMENDATIONS

I recommend that you concur in the attached determinations and sign the attached information memorandum to the Acting Assistant Secretary and the information memorandum to the Assistant General Counsel for Legislation and Regulation, Department of Commerce, which requests a docket number and clearance to publish the proposed rule.

1. I concur _____ Date
2. I do not concur _____ Date

Attachments

Attachment

DETERMINATIONS

NATIONAL ENVIRONMENTAL POLICY ACT

An environmental assessment has been prepared, which describes the impact on the human environment that would result from its implementation.

EXECUTIVE ORDER 12866

Pursuant to the procedures established to implement section 6 of E.O. 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

REGULATORY FLEXIBILITY ACT

NMFS prepared an initial regulatory flexibility analysis as part of the regulatory impact review, which describes the impact this proposed rule would have on small entities, if adopted. I recommend you initially determine that this rule could have a significant economic impact on a substantial number of small entities.

COASTAL ZONE MANAGEMENT ACT

I have determined that this rule will be implemented in a manner that is consistent to the maximum extent practicable with the approved coastal management program of the State of Alaska. This determination was submitted for review by the responsible State agency under section 307 of the Coastal Zone Management Act.

PAPERWORK REDUCTION ACT

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act. This collection-of-information requirement has been submitted to the Office of Management and Budget for approval.

ENDANGERED SPECIES ACT

I have determined that fishing activities conducted under this rule will not affect endangered and threatened species listed or critical habitat designated pursuant to the Endangered Species Act in any manner not considered in prior consultations on the groundfish fisheries of the BSAI.

MARINE MAMMAL PROTECTION ACT

I have determined that fishing activities conducted under this rule will have no adverse impact on marine mammals.

EXECUTIVE ORDER 12612

This rule does not contain regulatory provisions with federalism implications sufficient to warrant preparation of a federalism assessment.

ADDITIONAL ISSUES RELATED TO AMENDMENT 49

Regulation of On-shore Processing

Because the Magnuson-Stevens Act does not authorize NMFS to regulate on-shore processing of fish, Federal utilization requirements would not be extended to shore-based processors. The Council has assumed that the State of Alaska (State) will implement parallel IR/IU regulations for this sector. In testimony at the September 1996 Council meeting, the State indicated its intent to pursue parallel requirements for shore-based processors. Parallel State regulations are especially necessary to address the relationship between the processing plant and the delivering vessel. Specifically, it is necessary that an IR/IU program require a processor to accept all IR/IU regulated species offered for delivery by vessels operating in BSAI groundfish fisheries. In the absence of such a requirement, rejection of deliveries would in effect be discarding of IR/IU regulated species by the processor.

IR/IU Requirements during Directed Fishing Closures.

NMFS assesses each groundfish TAC annually to determine how much of a species' TAC is needed as bycatch in other groundfish fisheries. The remainder is made available as a directed fishing allowance. NMFS closes a species or species group to directed fishing when the directed fishing allowance for that species has been reached in order to leave sufficient portions of the TAC to provide for bycatch in other fisheries. However, if TAC is reached, retention of that species becomes prohibited and all catch of the species must be discarded. Under existing regulations, a species or species group may be open to directed fishing, closed to directed fishing, or retention may be prohibited.

Directed fishing is defined in regulations as "any fishing activity that results in the retention of an amount of a species or species group on board a vessel that is greater than the MRB amount for that species or species group." The MRB amount for a species is calculated as a percentage (by weight) of the species closed to directed fishing relative to the weight of other species that are open for directed fishing and retained on board the vessel. On catcher/processors, which retain product rather than whole fish, the MRB amount is determined using round-weight equivalents, which are calculated using NMFS PRRs established in regulation at Table 3 of 50 CFR part 679. The MRB percentage for each species is established in regulation at Table 11 of 50 CFR part 679. When a species is closed to directed fishing, bycatch amounts of the species may still be retained on board a vessel,

up to the MRB amount in effect for that species and catch in excess of the MRB amount must be discarded.

The MRB percentages serve as a management tool to slow down the rate of harvest of a species closed to directed fishing, and to reduce the incentive to fishing vessels to target on that species. In most cases, a MRB of 20 percent is established to slow the harvest rate of a species, yet avoid significant discard amounts of these species to the extent they are taken as bycatch in other open groundfish fisheries. Directed fishing closures are also made when a fishery has reached a prohibited species bycatch allowance, or to prevent overfishing of another groundfish species taken as bycatch.

Under the proposed IR/IU program, if a vessel's bycatch of an IR/IU species exceeds a MRB amount in effect for that species, all catch in excess of the MRB amount would have to be discarded. NMFS Enforcement has indicated that monitoring and enforcement of the proposed IR/IU program will be effectively impossible whenever directed fishing for an IR/IU species is closed.

EXAMPLE--ISSUES ADVISORY

MEMORANDUM FOR: Rolland A. Schmitten
Assistant Administrator
for Fisheries

FROM: Steven Pennoyer
Administrator, Alaska Region

SUBJECT: Proposed Rule to Implement Amendment 49 to the
Fishery Management Plan for the Groundfish
Fishery in the Bering Sea and Aleutian Islands
Area (FMP)--ISSUES ADVISORY

This is to advise you of issues regarding the subject action.

BACKGROUND

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